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No. 10-1129

Supreme Court, U.S.
FILED
APR 28 2011
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

DONALD ALDRIDGE, et al.,

Petitioners,

v.

CITY OF MEMPHIS, TENNESSEE, et al.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT CITY OF MEMPHIS

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INTRODUCTION

Petitioners offer no compelling reasons for the Court to grant a writ of certiorari.

This case focuses on a now-rescinded city charter provision and a local administrative decision that impacted a finite number of police captains at one particular time and in one particular place (Memphis, Tennessee). It presents a unique situation that will never recur, not even in Memphis. As Petitioners themselves told the court of appeals, "This is a fact-intensive case involving a unique state law applicable only to the rank structure of the Memphis Police Department." (Brief of Appellant, Statement in Support of Oral Argument)

Petitioners offer none of the usual reasons that would support the granting of a petition of this nature—no conflicting judicial decisions, no unresolved important questions of federal law, no radical departure from the accepted and usual course of judicial proceedings. Rather, they argue that the unanimous lower courts (two district court judges[1] and a three-judge panel of the court of appeals) misapplied settled law to the peculiar facts of this case. In short, they seek simple error correction, not a function of this Court. They even contend that Tennessee appellate courts have consistently misinterpreted Tennessee municipal law, and that this Court should overrule the court of appeals on this point and should "correct" the state courts on state law—also not a practice this Court embraces.

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1. Two judges in the district court for the Western District of Tennessee, Hon. J. Daniel Breen followed by Hon. S. Thomas Anderson, decided various aspects of this case.

RESPONSE TO QUESTIONS PRESENTED

Petitioners' statement of Questions Presented reveals a great deal by what they do *not* assert.

In the body of their petition, Petitioners, the majority of whom are white males, repeatedly imply that the City has discriminated against them on the basis of sex and race. Yet they do not raise these issues before this Court. By their silence they concede that the lower courts ruled correctly on those questions. Age is the only protected category that figures into their Questions Presented.

Nor do Petitioners pursue their Equal Protection argument from below, in tacit recognition that the City had a rational basis for its decision, as the court of appeals held. App. 26a-28a.

Petitioners continue to assert a Due Process claim, whose viability requires the existence of a property right in their continued employment, as they necessarily concede. But they have dropped their claim for breach of implied contract, perhaps because they acknowledge they had no implied contract to breach, another way of saying that they had no property interest in continued employment. In any event, as noted below, Tennessee courts have consistently held that Memphis City Charter Section 67, now rescinded, did not create a property interest.

Moreover, in their Questions Presented, Petitioners misstate certain facts.

First, in their statement of the ADEA issue, Petitioners wrongly assert that the City promoted younger employees "to essentially the same jobs" as those held by the 30-year tenure Captains. As developed elsewhere herein, the uncontroverted evidence showed that in a series of promotions totally independent of the decision to end tenure rank for Captains, Sergeants were promoted to the Lieutenant rank, and several Lieutenants were promoted to the Major position. The tenure Captains had been performing the duties of a variety of ranks, from Patrol Officer up, and after the decision in controversy here, they continued to have the option to remain with the department and to test for any rank. They were not terminated, nor were they "replaced" by younger persons. App. 6a-7a, 79a.

Second, in that same issue statement, when addressing the "reasonable factors other than age" that animated the decision to eliminate the Captain rank operationally, Petitioners also misstate that they "undisputedly disproved the veracity of these factors." Five judges below, two at the district court level and three on the court of appeals, carefully examined the record and rightly concluded that, contrary to Petitioners' bald assertion, the City established beyond challenge the existence of reasonable factors other than age that led to the decision in question.

RESPONSE TO STATEMENT OF THE CASE

This dispute has its origins in a 1927 provision of the Memphis City Charter ("Section 67") whose purpose was to award retirement benefits to 30-year veterans of the city's fire and police departments at the level of a captain's

retirement pay. App. 3a.[2] Under a 1978 amendment to Section 67, the 30-year provision does not apply to any City employee hired after January 31, 1979, now more than 30 years ago. *Id.* Accordingly, the 30-year rule is no longer in effect; thus the situation giving rise to this case will never recur, in Memphis or anywhere else, reason enough for this Court to deny the petition.

After he became Director of the Memphis Police Department ("Department") in August 2004, Larry Godwin ("Godwin") concluded that as then constituted, the "tenure Captain" rank was superfluous. App. 5a. Contrary to Petitioners' unsupported assertion that Godwin acted without studies or data, the unchallenged proof showed that in fact Godwin had commissioned a Department analysis showing that under the automatic promotion provision of Section 67 still in effect at the time for 30-year veterans, most of those who held the Captain title, having not achieved it through merit testing, were receiving a Captain's pay while performing the duties of lower-ranking officers, such as Lieutenants (who normally

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2. Consistently over a period of more than 20 years, multiple Tennessee appellate judges have determined, without dissent, that this was the specific purpose of Charter Section 67, *viz.*, purely to provide a retirement benefit to fire and police employees with long years of service. The Tennessee Supreme Court has declined several invitations to change this precedent, most recently in April 2011: *Edwards v. City of Memphis*, No. W2010-00983-COA-R3-CV, 2010 Tenn. App. LEXIS 707 (Tenn. Ct. App. Nov. 12, 2010), at *11, *perm. app. denied*, April 13, 2011. *See also Dunlap v. City of Memphis*, No. W2003-02649-COA-R3-CV, 2004 Tenn. Ct. App. LEXIS 738, at *5 (Tenn. Ct. App. Nov. 12, 2004); *Posey v. City of Memphis*, 23 S.W.3d 332, 335-336 (Tenn. Ct. App. 2000), *perm. app. denied*, June 12, 2000; *Burrell v. City of Memphis*, No. 29, 1989 Tenn. App. LEXIS 544, at *2, 5-6 (Tenn. Ct. App. August 16, 1989), *perm. app. denied*, Nov. 6, 1989.

made $8,046.27/year less than Captains), Sergeants (normally making $12,907.65 less than Captains), and even Patrol Officers (normally making $17,802.93 less than Captains). *Id.*; App. 18a, 25a; R. 106, Ex A, Godwin Dep. at 37-38, 51-55, 59, 162-163; R.106, Ex. C, Tusant Dep. at 36, 54-55, 63, 65, 70-72, 85-86. 241, 243.[3] The same automatic-promotion rule applied to everyone, regardless of race, gender, or age.

As Director Godwin determined and common sense dictates, this was an inefficient system and a waste of taxpayer's money.[4] App. 5a. He felt that every Department employee should receive a salary commensurate with the

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3. Petitioners note that all the Captains were performing their duties satisfactorily, but fail to point out that many of them were performing duties of lower level employees. Some, for example, were doing a satisfactory job as patrol officers. App. 5a.

4. Whether Godwin's decision was necessary to keep the Department's total expenditures within its budget for a particular year is irrelevant. Petitioners' quibble about how Godwin presented his decision to the Captains orally at a meeting, as compared to his consistent testimony under oath, is a red herring. It requires no expertise to understand that in the long run it saves taxpayer money and makes for a more efficient operation to pay employees in line with the duties they actually perform, rather than paying them more for an artificial title unrelated to their duties. Petitioners quote the City's Chief Administrative Office ("CAO") as testifying that Godwin's decision was not a necessary step for the City to meet its payroll, but they fail to note that the CAO also testified, without contradiction, that the City had "organizational financial challenges" at the time; that the City needed to reduce spending to increase its reserve fund; and that "during that time period . . . all [City] divisions were asked to reduce their budget . . . ." App. 7a, 19a-20a. In short, as the court of appeals observed, financial and operational inefficiency has been the City's consistent and reasonable justification for the change. App. 18a-19a.

duties the employee actually performed, rather than a salary affixed to a paper rank whose duties the employee was not performing. He estimated that eliminating the tenure Captain rank and returning those holding that rank to the ranks they had held before their automatic promotion, even while retaining the Captain-level pension benefits for those who qualified for them under Section 67, would save the Department approximately $1.4 million. *Id.*

Accordingly, Godwin decided to preserve the Captain rank on the books for purposes of retaining the Captain's pay retirement benefit for all existing 30-year veterans covered by Section 67, but not to continue using the Captain rank operationally.

Several years earlier, in 1988, the Memphis Fire Department, also covered by Section 67, had made a similar decision for the same reasons, a decision that Tennessee courts upheld against a challenge much like the one here. App. 15a; *Burrell*, 1989 Tenn. App. LEXIS, at *4-5. Also, Godwin's predecessor as Police Director, Melvin Burgess, had come to the same realization about the need to do away with the 30-year rule due to its operational difficulties, but he took no action at that time. R. 106, Ex. B, Burgess Decl. at ¶¶ 5-6.

In February 2005, Godwin advised those holding the tenure Captain rank that they had the option of retiring on a Captain's pay at the time, or continuing at their previous rank and pay, then receiving a Captain's retirement pay when they retired. If they wished to continue working for the Department, they had the option, as they did before, of applying for higher ranks, subject to merit testing. App. 6a.

As with the 30-year rule itself, Godwin's decision to abolish the tenure Captain rank (except to retain its core retirement benefit for everyone with 30 years on the force) applied equally to every Department employee, regardless of race, gender, or age, and his decision had nothing to do with those individual characteristics. App. 34a. As the court of appeals rightly observed and Petitioners have not countered, "The record is devoid of any evidence that Godwin or any other City or Department employee displayed explicit animus toward any protected class." App. 8a. Godwin's remarks critical of Captains as a group do not equate to criticisms of persons due to their age, for example.

Petitioners note that this decision affected only persons over the age of 40. Of course this was true by definition—this matter only involved persons who had been employees for 30 years—but it hardly shows that Godwin (himself in his 50s at the time) was targeting employees because of their age. App. 8a. Only the Captain rank was affected by the decision, while every other rank above Patrol Officer was also populated by individuals with an average age above 40: Inspector (57.77), Major (52.16), Lieutenant (46.51), and Sergeant (42.39). *Id.* Indeed, as Petitioners note, even including Patrol Officers in the pool, the average age of all ranks other than Captain was close to 40 (37.81). Petition at 10.

Petitioners further note that approximately 45% of the 93 Captains affected by Godwin's decision were African Americans and women. In other words, 55% of those adversely impacted were white males. Even more strikingly, of the affected individuals who originally brought this action, nearly two-thirds (17 of 26) are white

and only three are women. App. 9a. Moreover, only one in four of the Captains that Petitioners say were affected (23 of 93) seeks relief in this Court. None of this is disputed. Nor are these categories even at issue here; as noted, the Petitioners' Questions Presented do not assert race or sex discrimination.

Finally, Petitioners observe that some time after implementing the decision to stop using the Captain rank as an operational position, the Department promoted a number of Sergeants to the Lieutenant rank, and several Lieutenants to the Major position. Yet Petitioners fail to show any connection between the two events. Indeed, the uncontroverted proof showed there was no connection. App. 6a-7a. The proof demonstrated that promotions were done in response to a serious shortage of officers at those levels, which is undisputed (Petition at 7), and that the decision to take this action was made, and the process begun, well before Godwin's decision with regard to 30-year Captains. *Id.* As the courts below acknowledged, the two decisions were made independently and had absolutely no relation to one other. *Id.* Moreover, the demoted tenure Captains had the same opportunity as everyone else to test for positions, and Petitioners do not contend that they were improperly denied promotions. App. 7a, n.4.

REASONS TO DENY THE PETITION

Not surprisingly given the extremely limited scope of this case, Petitioners cite no conflicting decisions among the United States courts of appeals. Nor do they point to conflicting decisions among state courts, or between state and federal courts, on an important federal question. They do not demonstrate that the courts below so far departed from the accepted and usual course of judicial proceedings

as to call for this Court to exercise its supervisory power. Nor do they argue that this Court has failed to resolve an important federal question that should be settled. Finally, they do not deny that this is a non-recurring situation confined to one locality.

Petitioners fume at length about the City's past racial and gender discrimination, but as indicated, in the present context they only raise age discrimination as a protected category issue. Thus their discussion of past discrimination, or of the purported effects on African Americans and women of Godwin's decision regarding the Captain rank, is so much sound and fury, signifying nothing.

With regard to their age claim, revealingly, Petitioners frame the issue as the lower courts' "misapplication" of the "reasonable factors other than age" (RFOA) defense. Petition at 12. They do not assert that the nature of the defense is unclear or that parts of it are unresolved by the courts. They simply aver that the courts below misapplied settled law to the facts. Again, they appeal for error correction, not a function of this Court.

Petitioners draw this Court's attention to its prior decisions in *Smith v. City of Jackson*, 544 U.S. 228 (2005) and *Meachem v. Knolls Atomic Power Lab.*, 554 U.S. 84 (2008), discussing the burden that an employer must carry to take advantage of the RFOA defense. The courts below acknowledged and applied these decisions. App. 21a, 25a, 47a, 54a, 55a. Both found that the City had met its burden, by any definition. Indeed, the reasons for the City's decision are plain on their face—in the district court's summary, the absence of a need for "a management level rank achieved solely by length of service," and the

substantial savings in taxpayers' money that would result from its elimination. App. 54a-55a.

No statistical analysis can add to the unremarkable insight that 30-year employees are all over the age of 40, or can lead to the conclusion that this in turn supports a claim of disparate impact on the basis of age.

Similarly, Petitioners frame their Due Process claim in terms of the lower courts' supposed "misapplication" of cases as "an error that . . . should be corrected". Petition at 18. That is, they merely cite settled law and challenge its application to undisputed facts, not an argument for the granting of a certiorari petition.

Petitioners necessarily concede that their Due Process claim requires the existence of an independent source of law, *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 569 (1972), in this case a city ordinance, that creates a property interest in their continued employment as a captain. Petition at 18. They rely on former Memphis City Charter Section 67 as the independent source. But they also concede, as they must, that Tennessee appellate courts have consistently held that Section 67 created no such property interest, a position the state courts have reaffirmed in recent weeks. See note 2, above; Petition at 20-21. The issue has been repeatedly presented and long resolved by courts in the governing jurisdiction. The lower federal courts agree. This Court is hardly the proper forum in which to challenge state courts' interpretation of a now-defunct city charter provision.[5]

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5. Petitioners also refer in passing to City Charter Sections 246 and 129. Petition at 10. As the lower courts explained, citing Tennessee authority, Section 246 refers to Civil Service review

CONCLUSION

This is not a matter worthy of the Court's consideration. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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of disciplinary actions; this is not a Civil Service case, and the decision at issue here was not a disciplinary action. App. 13a, 95a-96a. As for Section 129, Petitioners themselves note that it was superseded in 1982—in fact, it was superseded by Section 246—decades before the decision in question here. Petition at 3, 23.